

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: )  
LERNOUT & HAUSPIE SPEECH ) Case No. 00-4397 to 00-4399  
 ) Adver. No. 04-54842  
 )  
Debtor )  
 ) November 23, 2004

TELEPHONE CONFERENCE CALL  
BEFORE THE HONORABLE JUDITH H. WISEMUR  
UNITED STATES BANKRUPTCY COURT JUDGE

U.S. BANKRUPTCY COURT  
FILED  
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Motion - Argument/Nguyen

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1 (Hearing in session)

2 THE COURT: Hello.

3 MR. TRENCH: Good morning, Your -- good afternoon,  
4 Your Honor.

5 THE COURT: Good afternoon. Mr. Trench?

6 MR. TRACY: Yes, Your Honor.

7 THE COURT: Yes, and I have Mr. Fallon, Ms. Nguyen,  
8 Mr. Flynn, Mr. Tacconelli, and Ms. Coggins.

9 A FEMALE SPEAKER: Good afternoon, Your Honor.

10 THE COURT: Good afternoon. Mr. Trench?

11 MR. TRENCH: Yes. I'm on speaker. Can you hear me  
12 clearly?

13 THE COURT: Yes, I can.

14 MR. TRACY: Okay. Well, this I think is -- is KPMG's  
15 motion. I'm glad to present the argument in any fashion or  
16 sequence you would like, but --

17 THE COURT: But you're right. I'll gladly hear from  
18 a representative of KPMG first. Who will speak for KPMG?

19 MS. NGUYEN: Your Honor, this is Suong Nguyen from  
20 Davis Polk on behalf of KPMG, LLP.

21 THE COURT: Yes, Ms. Nguyen.

22 MS. NGUYEN: We made the motion, and we're  
23 respectively requesting a transfer of this case to the District  
24 of Massachusetts. The reason we're making this request is  
25 because Massachusetts is where numerous cases that are related

Argument - Nguyen

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1 to Lernout & Hauspie have been pending and continue to be  
2 pending for several years now, the first case filed in 2000.

3 So when the L&H litigation trust had filed their case  
4 several months ago against KPMG, U.S. and KPMG Belgium, it was  
5 against this back -- backdrop of litigation that had been  
6 pending before Judge Saris and also before Magistrate Judge  
7 Collings in Massachusetts, and it was only by virtue of the  
8 fact that Lernout & Hauspie at the time was in bankruptcy that  
9 L&H was not named in those cases.

10 So the basis for our transfer is that Judge Saris and  
11 Magistrate Judge Collings have familiarity with the facts and  
12 issues that are overlapping with this case. All the  
13 Massachusetts cases relate to L&H's demise. It relates to its  
14 1998 and 1999 financial statements and also KPMG, U.S. and  
15 KPMG, Belgium's respective role in connection with L&H's  
16 bankruptcy.

17 The review of the complaint in this case as compared  
18 to the complaints that have been filed in Massachusetts showed  
19 that they rely on the same documents at issue, the same factual  
20 allegations at issue, and an example of that relates to KPMG,  
21 U.S.'s role in reviewing various Korean contracts, LDC  
22 (phonetic) contracts, and similar accounting issues.

23 Massachusetts is also where the cases had been  
24 transferred from both the Delaware District Court and also  
25 Pennsylvania. About two years ago, Judge Robinson from the

Argument - Nguyen

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1 District of Delaware had transferred four cases that dealt with  
2 the Dictaphone and Dragon transaction to Massachusetts, and the  
3 rational for that transfer was because the other L&H related  
4 lawsuits had already been pending in Massachusetts.

5 The Dragon and Dictaphone transactions are the same  
6 transactions that are issue in the L&H litigation trust's  
7 action against KPMG, U.S.

8 THE COURT: What's your reaction to the plaintiff's  
9 argument that the first filed rule shouldn't apply here because  
10 KPMG -- there are no common parties at this point since KPMG  
11 apparently has settled all of its -- all of the claims against  
12 it, asserted against it in the Massachusetts actions?

13 First, with respect to the fact that KPMG, U.S. and  
14 KPMG, Belgium have settled or are in the process of finalizing  
15 the settlements of the Massachusetts action, it really misses  
16 the point, because our basis for transfer is because  
17 Judge Saris and Magistrate Judge Collings had familiarity with  
18 the issues here which the trust conceived are overlapping with  
19 those in this case.

20 With respect to the first filed rule and the fact  
21 that they're different parties or different theories, we cited  
22 numerous cases in our reply brief which show that courts have  
23 -- have transferred cases where there are different parties and  
24 different legal theories at issue, and, in fact, the Filler  
25 case, which is the one by Judge Robinson, the District of

Argument - Nguyen

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1 Delaware, when Judge Robinson transferred the Dictaphone and  
2 Dragon cases, they dealt with different legal theories, and the  
3 Baker, Filler, all those other plaintiffs were not plaintiffs  
4 in the Massachusetts action.

5 THE COURT: Uh-huh.

6 MS. NGUYEN: So we think that the law is very clear  
7 that it -- it's -- it's of no moment that the parties or the  
8 legal theories in this case are -- are not the same, because  
9 Judge Collings and Saris have gone through the same issues that  
10 would be relevant here. These issues, for instance, relate to  
11 KPMG, Belgium's production of documents. There's Belgium  
12 secrecy issues at stake. We -- KPMG, U.S. has also produced  
13 documents in the Massachusetts case, and we had various motions  
14 about the scope of our production before  
15 Judge Collings already.

16 In addition, other parties, including ourselves, have  
17 produced documents in the case, and those documents are  
18 governed by a confidentiality agreement that Judge Collings has  
19 entered. So that if there's any disputes about the designation  
20 of certain documents as confidential or transcripts of  
21 depositions that would quote from those documents as  
22 confidential, Judge Collings would be the one overseeing that,  
23 and we expect the same issues that, you know, were presented in  
24 the Massachusetts case to be presented here.

25 The other reason why Massachusetts makes sense is

Argument - Nguyen

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1 because the trustee in this case concedes that Massachusetts is  
2 the center of gravity of the alleged conduct in this case, and  
3 there are numerous witnesses who are present in Massachusetts.  
4 L&H's U.S. offices was in Massachusetts. There's a claim by  
5 the litigation trustee for the -- violation of the  
6 Massachusetts consumer protection statute. There's allegations  
7 that the auditing functions at issue here occurred in  
8 Massachusetts.

9 So I -- we think that that is the reason why several  
10 months ago the trustee had initially agreed to transfer, and  
11 while the trustee has a right to change its mind, we submit  
12 that the basis for transfer remains the same here.

13 The last thing I would add, Your Honor, is that since  
14 our transfer motion had been filed, Judge Robinson of the  
15 District of Delaware had withdrawn the reference with respect  
16 to a core proceeding. It was a preference complaint that the  
17 trust had filed against KPMG, U.S. And so this suggests that  
18 in this particular case, which is a noncore case dealing with  
19 prepetition events, that there would also be a withdraw of the  
20 reference and that this case really should probably belong on  
21 the district court, and we submit it should be transferred to  
22 the District Court of Massachusetts.

23 THE COURT: Uh-huh. Understood. Mr. Trench, will  
24 you be speaking on behalf of the -- or Mr. Tacconelli?

25 MR. TRENCH: I will, Your Honor. This is David



Argument - Trench

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1 Trench. I'll speak on behalf of the trustee.

2 THE COURT: All right. What about the jury trial  
3 situation? I didn't see that taken up in the papers.

4 MR. TRENCH: We -- we briefly took it up, Your Honor,  
5 and it was to the point that the jury trial issue is not a  
6 transfer motion consideration. The question that KPMG poses is  
7 should this case be tried in Delaware or Massachusetts. If  
8 there's --

9 THE COURT: What --

10 MR. TRENCH: -- a right to a jury trial and the  
11 Bankruptcy Court in Delaware is not empowered to conduct a jury  
12 trial, then the proper remedy for the one seeking the jury  
13 trial is to withdraw the reference from the Bankruptcy Court to  
14 the District Court in Delaware.

15 THE COURT: Uh-huh.

16 MR. TRENCH: It has nothing to do with whether or not  
17 this case more properly belongs in Massachusetts or in  
18 Delaware. So with respect to the issue in front of the Court  
19 today, which is should the case be transferred to Delaware, the  
20 fact that they have a right to a jury trial, which they have  
21 not yet asserted, but the fact that they have a right to one is  
22 not a factor in whether or not Massachusetts should be the  
23 venue or Delaware should be the venue.

24 So I think that's a red herring, if you will. It's  
25 not something which should weigh in your determination about

1 whether or not the case should be transferred to Massachusetts.

2 THE COURT: Help me to understand your assertions  
3 regarding the Delaware nexus here. Clearly, the bankruptcy  
4 proceeding has been pending here since 2000. That -- what  
5 aspect of that or anything else should compel me to honor the  
6 plaintiff's choice of forum to defer to it in these  
7 circumstances?

8 MR. TRACY: The way the rules work with respect to  
9 consideration of transfer is for the Court considering the  
10 transfer to look at a series of well-established factors, and  
11 there's some that are outside the 12 that are listed, but the  
12 very first factor is the plaintiff's choice of forum. If the  
13 plaintiff -- and here, we are the plaintiff. If the plaintiff  
14 chooses a forum that has jurisdiction, which we've done, then  
15 that's to remain the forum unless there's reason shown to  
16 change that.

17 Now, we did choose this forum, and we chose it for  
18 several reasons. We chose it because we appear here regularly,  
19 and it's a convenient forum for us in that respect. We chose  
20 it because this claim is the largest cause of -- largest asset  
21 of this estate and will affect how the estate continues to be  
22 administered.

23 We also chose it because one of the factors in  
24 determining whether or not a transfer should occur is the speed  
25 with which cases are handled in the respective jurisdictions,

## Argument - Trench

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1 and the cases in Bankruptcy Court move with a certain speed  
2 which is not matched in District Court anywhere by my  
3 experience in this court and other Bankruptcy Courts and in  
4 District Courts throughout the country, and, in fact, we  
5 attached I think as an amendment or an addendum or an exhibit  
6 to our motion a printout with respect to Judge Saris' average  
7 time of trial. And this is not a criticism of her. It's just  
8 a measure of the time that it takes for a case to work its way  
9 through District Court as opposed to Bankruptcy Court and a  
10 quick resolution of something that we have an interest in. So  
11 that's another reason why we chose this -- this forum.

12 Another reason is that under the documents which  
13 authorize and empower the litigation trustee to bring this  
14 action, any settlement which may be reached must be approved by  
15 you. We must bring a claim before -- file a motion before this  
16 Court for approval of any such settlement. In addition, KPMG,  
17 the moving party, is a -- is an entity that's organized and  
18 existing under the laws of the State of Delaware.

19 So we have used those reasons, and that's why we  
20 first chose this particular venue, and with all due respect, I  
21 think it is up to KPMG to say that there are compelling reasons  
22 to move this from where we chose to bring the action to another  
23 jurisdiction.

24 THE COURT: Well, let's take a look at those reasons  
25 from your vantage point. You've acknowledged a substantial

## Argument - Trench

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1 overlap at least in facts. You've asserted differences in  
2 legal theories, and indeed, there are other legal theories  
3 propounded in the other actions in terms of securities fraud  
4 and the like and some of the same causes as well.

5 What about those types of issues that have -- and  
6 nobody is talking about res judicata or collateral estoppel  
7 here. Obviously, the trustee of L&H was not a party to, nor  
8 L&H for that matter, to anything that was decided in  
9 Massachusetts, and I don't think there is question that the L&H  
10 trustee would have the opportunity to litigate any and all of  
11 those questions.

12 But when we're talking about questions involving, for  
13 instance, Belgium secrecy laws in connection with discovery  
14 demands, when we're talking about other aspects of  
15 international law that apparently have become familiar to  
16 Judge Saris and Judge Collings, isn't that a -- the kind of use  
17 of judicial resources that the first filed policy, whether or  
18 not it applies specifically to this case, was intended to  
19 foster?

20 MR. TRENCH: I think it's very close to that,  
21 Your Honor, but let me -- before I address those things  
22 directly, let me make a comment about the -- the status and the  
23 nature of the two cases. Because KPMG has effectively settled  
24 all of their claims and are only in the most nominal sense a  
25 party in those cases, there is no common party between this

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1 action and any of the pending Massachusetts actions.

2 THE COURT: Does that matter?

3 MR. TRENCH: Yes, it does, Your Honor, because we've  
4 looked and I think KPMG has looked, and we have never found a  
5 single case in the United States in which there is no common  
6 party between cases that has resulted in a transfer.

7 THE COURT: Do you think that the basic premises of  
8 the first filed rule are undercut to the extent that the  
9 principal of that rule should not be applied? In other words,  
10 you acknowledge that there is the same set of facts or  
11 virtually so. You -- and, by the way, KPMG was a party to  
12 those proceedings. It's not as if there -- you know, there's  
13 no connection in terms of the identification of parties by the  
14 vociferous nature of your memorandum which I will tell you  
15 probably crossed the line.

16 I was dismayed to read it I will tell you. The  
17 arguments are certainly sound and worthy of consideration, but  
18 the tone I would ask you to tone down, if you would.

19 MR. TRENCH: Of course.

20 THE COURT: But the basic concept that the facts and  
21 -- and some of the law are identical, doesn't that really  
22 dictate that there ought not to be a division of the -- the  
23 basic controversy, what happened with the collapse of L&H and  
24 the preceding events to that collapse, particularly the  
25 transactions involving Dragon and Dictaphone and KPMG's

## Argument - Trench

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1 involvement, U.S. and Belgium, in that entire debacle. That's  
2 the fundamental nature of what's still there, what was there to  
3 begin with, what's still there even without KPMG and what's  
4 here in this case, is it not?

5 MR. TRENCH: Well, to some extent that's right,  
6 Your Honor, but as I understand the -- the factors that are to  
7 be weighed, they include judicial economy, which is what I  
8 think the matters that you discussed relate to, and judicial  
9 economy traditionally and often in transfer actions -- and I  
10 think when Judge Robinson transferred the four cases from  
11 Delaware means that there would -- if not for a transfer, there  
12 would be a party defending or prosecuting the -- virtually the  
13 same claim in two separate jurisdictions with the risk of  
14 duplication of discovery and inconsistent rulings.

15 Now, in this particular case, there -- that won't  
16 happen. Discovery is effectively closed in Massachusetts.  
17 There won't be inconsistent rulings, because there is no ruling  
18 that has involved L&H or the litigation trustee in  
19 Massachusetts.

20 THE COURT: No, there isn't, but there are rulings  
21 that I would probably be -- not -- perhaps not me, but perhaps  
22 the District Court if this were -- if the reference were  
23 withdrawn. Should the Belgium -- KPM, Belgium matter be  
24 transferred to Belgium on the ground of forum non conveniens,  
25 what are the impacts of the secrecy laws of Belgium on these

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1 matters, confidentiality orders apparently entered.

2 It may not be between the same parties, but there are  
3 identical -- as a matter of fact, one of the parties is the  
4 same. I suspect that KPMG, Belgium was involved in the motion  
5 to transfer venue to Belgium.

6 MR. TRENCH: Yes, Your Honor. They did move to  
7 dismiss for forum non conveniens. That motion was denied by  
8 Judge Saris. It was in connection with the motion to dismiss  
9 the securities fraud claims against a number of defendants, by  
10 a number of defendants, and Judge Saris did, in fact, determine  
11 that the allegations were sufficiently pled to meet the  
12 requirements of the securities act which are different  
13 requirements that we have, and there -- there were other  
14 decisions relating to securities fraud standards which do not  
15 relate to us.

16 None of her decisions affected any of the causes of  
17 action or touched on any of the causes of action that we bring  
18 here. The closest that any of her decisions came to that was  
19 her -- her order dismissing or granting a motion to dismiss an  
20 action brought by the Dictaphone trustee who did assert a  
21 Massachusetts Consumer Protection Act claim. She dismissed it,  
22 however, not because she considered that claim and found that  
23 it was wanting but because the Dictaphone trustee representing  
24 new Dictaphone was effectively seeking damages to old  
25 Dictaphone and didn't have standing to bring the action, and

## Argument - Trench

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1 that's an entirely different issue from the issue of the L&H  
2 trustee who represents the former client of KPMG, LLP and KPMG,  
3 Belgium who's bringing a malpractice action based on that  
4 relationship, a breach of -- aiding and abetting breach of  
5 fiduciary duty claim based on that relationship and a violation  
6 of the Massachusetts Consumer Protection Act. We have an  
7 entirely different circumstance.

8 And you've mentioned the Belgium security -- secrecy  
9 act, and that's interesting, because that's an act which was  
10 created in Belgium to prohibit accountants and others from  
11 disclosing secrets of their clients and holding them liable for  
12 sanctions if they do it, and in the case in Massachusetts, the  
13 court found that there were exceptions to that act which  
14 allowed plaintiffs who were not in privity with either party to  
15 see those records and get those records, notwithstanding the  
16 fact that the Belgium secrecy act would appear to prohibit it.

17 In our case, Your Honor, there's something entirely  
18 different, something none of the courts approached, and that is  
19 there's an exception to the Belgium secrecy act which relates  
20 to consent by the client. Well, we're the client, and -- and  
21 if we seek these records and KPMG, Belgium says you can't see  
22 them because we are prohibited from the -- from the disclosure  
23 of these secret records, which are effectively records of L&H's  
24 representation, we will give consent to them to supply them to  
25 us, and none of the judges or magistrates consider that



## Argument - Trench

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1 argument because those facts weren't present. That's a  
2 different circumstance.

3 So it's true that the magistrate and the court did  
4 consider that act in expert affidavits on Belgium law and did  
5 make rulings and, in fact, even enjoined KPMG, Belgium from  
6 seeking a -- the enforcement of a writ in Belgium to prevent  
7 the plaintiffs from getting those documents after the -- the  
8 Court in Massachusetts said they could.

9 Those things are all true, but we have a different  
10 position in this as we do in all the other claims. We are the  
11 former client, and the considerations as to whether or not that  
12 applies are new considerations, whether you make them,  
13 Judge Robinson makes them, Judge Saris makes them. They're  
14 going to be things that haven't been considered before.

15 THE COURT: I understand. Let me understand that  
16 you've acknowledged that some of the witnesses remain in  
17 Massachusetts. Others are in other places, as I recall,  
18 Houston, Atlanta, and the like.

19 MR. TRENCH: Yeah.

20 THE COURT: Who's in Delaware?

21 MR. TRENCH: I don't think that there's -- there's a  
22 witness that we -- that we're aware of right now that's in  
23 Delaware, Your Honor, but the number of witnesses that are in  
24 Massachusetts is few, and we frankly don't know where all of  
25 the witnesses are until we do our discovery, but --

Argument - Trench

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1 THE COURT: Are the books and records of KPMG, U.S.  
2 in Massachusetts as well?

3 MR. TRENCH: I -- I do not know the answer to that,  
4 Your Honor. I mean, we have not been able to do any discovery  
5 yet. So where their books and records are I don't know. I do  
6 know that one of the prominent members of KPMG, U.S. is out of  
7 Dallas, and he is perhaps the most prominent of those who acted  
8 in this matter, and I expect that his records are -- are in  
9 Dallas. I don't know the answer to that, but I don't know  
10 whether they're in -- in Massachusetts either.

11 I have heard -- well, I don't want to talk about what  
12 I've heard, because I -- I don't know the answer to that  
13 question.

14 THE COURT: Well, they've acknowledged that the --  
15 the alleged conduct by KPMG, U.S. at least occurred in  
16 Massachusetts.

17 MR. TRENCH: Your Honor, one of the things we pled  
18 and we assert is that the center of gravity of the conduct that  
19 forms the basis of our claims is in Massachusetts. We do plead  
20 that, and that was absolutely true.

21 That, however, I must point out, was an event that  
22 occurred in 1998, 1999, 2000 when L&H's U.S. headquarters were  
23 present in Massachusetts. We are now in 2004. L&H has no  
24 headquarters in Massachusetts, has no employees in  
25 Massachusetts, and that connection which caused the center of

## Argument - Trench

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1 gravity of the cause of action to be in Massachusetts is no  
2 longer a present fact. So for considering -- for the  
3 consideration of transfer purposes, I think the Court must look  
4 at the way things are today on November 23, 2004, and that is  
5 that L&H has no presence in Massachusetts. It did back then,  
6 and that's significant for the cause of action, but today it  
7 does not.

8 In fact, L&H's presence is in the form of Scott  
9 Baena, the litigation trustee who is in Miami but who does  
10 travel to Delaware from time to time and, you know, that's --  
11 that's the connection. It's no longer Massachusetts.

12 THE COURT: Understood. Let me offer the opportunity  
13 to KPMG to reply. Any other comments?

14 MS. NGUYEN: Your Honor, with respect to the location  
15 of documents, the allegations that the plaintiffs have made is  
16 that the auditing functions here occurred in Massachusetts.  
17 KPMG, U.S. has a Boston, Massachusetts office, and its work  
18 papers with respect to the work that it performed are, you  
19 know, collected and reside in Boston, Massachusetts.

20 We have a number of witnesses who work in the office  
21 who are still located in Massachusetts, and the fact that the  
22 -- you know, the plaintiffs point out that discovery has closed  
23 in the Massachusetts action would not be relevant with respect  
24 to discovery should the Court decide that discovery could  
25 proceed against the litigation trust in Massachusetts, because

The Court - Decision

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1 they would be on a separate schedule, and there are other  
2 parties that are on -- on a different scheduling, including the  
3 Dictaphone litigation trust. So it's not true that fact  
4 discovery would apply here and preclude the litigation trust  
5 from conducting discovery.

6 THE COURT: Understood.

7 MR. TRENCH: Your Honor, may I make a comment about  
8 that? Because I think there's a misunderstanding about what  
9 our position on that is.

10 THE COURT: Last comment. Go ahead.

11 MR. TRENCH: We -- we have not contended that we  
12 would be precluded from discovery by virtue of a transfer to  
13 Massachusetts. What we have asserted is there would be no  
14 economy of discovery by virtue of the transfer to  
15 Massachusetts. Whatever discovery we would take would be new  
16 discovery, whether it's in Massachusetts or in Delaware.

17 So the economy as it relates to the parties, to the  
18 Court, and to the witnesses is not present and is not a factor  
19 in -- in the transfer. That's the point that we were trying to  
20 make.

21 THE COURT: Understood. Let me reflect that we are  
22 working on a -- the defendant's motion to transfer the venue to  
23 Massachusetts. This action charges the defendants, we all  
24 know, with violations of Massachusetts law, with breach of  
25 fiduciary duties and with fraud in connection with serving as

## The Court - Decision

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1 accountants for L&H, L&H which collapsed in 2000 after  
2 purchasing two other entities, Dragon and Dictaphone.

3 The -- it is asserted by the defendants that the same  
4 underlying facts have been extensively litigated in  
5 Massachusetts. There are various actions, including  
6 shareholder actions, pending in Massachusetts. The defendants  
7 apparently have settled their cases in Massachusetts and are no  
8 longer active in the cases as of late, but the cases are still  
9 pending.

10 Of course, our framework for deciding these issues  
11 starts with Bankruptcy Rule 7087 which refers to 28 U.S.C.  
12 Section 1412 which poses the opportunity to transfer venue,  
13 "...in the interest of justice or the convenience of the  
14 parties." Seems to be that in this context, both of those  
15 prongs favor the transfer of venue in this case, and the most  
16 critical aspect of why that's so is the commonality of facts  
17 that is actually acknowledged by the plaintiff here, the fact  
18 that those cases, which have been pending for four years in  
19 Massachusetts, deal with the collapse of L&H, the role of the  
20 -- of, among others, KPMG, U.S. and Belgium in formulating the  
21 financial statements for 1998 and 1999 and 2000, for being  
22 involved in the transactions involving Dragon and Dictaphone  
23 and their involvement in the collapse of L&H. Those common  
24 facts I think compel the conclusion that the convenience of the  
25 parties and the interests of justice favor the transfer.

## The Court - Decision

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1           Indeed, we have it is recognized Massachusetts State  
2 law issues and Massachusetts as the center of gravity for this  
3 complaint. Of course, the plaintiff is right. The trustee is  
4 correct that a bankruptcy court or a district court let's say  
5 in Delaware would, of course, be qualified and able to apply  
6 the state laws of another jurisdiction. That's not  
7 fundamental, but I take note of it.

8           In passing, I note as well that there is really no  
9 nexus to Delaware here, the fact that the trustee is accustomed  
10 to coming to Delaware occasionally is not sufficient nexus,  
11 although clearly, there is a jurisdiction by the fact that the  
12 -- the bankruptcy is still pending and the -- and KPMG we note  
13 is a Delaware corporation. But basically, other than the  
14 bankruptcy, there are witnesses still in Massachusetts. The  
15 exact number is unknown, certainly witnesses in other places as  
16 well, but not Delaware.

17           It appears at first blush, although it's not pivotal  
18 to this decision, that at least some of the books and records  
19 are located in Massachusetts. It seems to me that the import  
20 of this -- the import of the first filed rule really compels  
21 this case to be situated in Massachusetts, and it is a question  
22 of judicial economy and the appropriate designation of judicial  
23 resources.

24           There is a learning curve when we talk about Belgian  
25 secrecy laws, even if we understand, as counsel for the

## The Court - Decision

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1 plaintiff has described, that the issues in terms of applying,  
2 for instance, those Belgium secrecy laws, may be different here  
3 because it is L&H, the actual client who is asserting the cause  
4 of action. Never the less, the familiarity with those matters  
5 does involve a learning curve as other matters do as well,  
6 matters that have been litigated for an extensive period of  
7 time in Massachusetts.

8 I do not take -- I don't consider the trustee's  
9 position that it is more likely that the case will be -- will  
10 have a speedier result in the Bankruptcy Court in Delaware or  
11 the District Court in Delaware for that matter than it would in  
12 Massachusetts. In fact, contrary speculation might be in order  
13 in light of the learning curve that has already been traversed  
14 by the Massachusetts District Court.

15 Plaintiff is certainly correct that some deference to  
16 its choice of forum is appropriate, but it seems to me that  
17 that deference is substantially outweighed here by the pendency  
18 of the Massachusetts actions which overlap to such a great  
19 extent in terms of factual underpinnings as well as certain  
20 legal concepts that might be applicable to discovery and to  
21 substance.

22 It seems to me that Judge Robinson in the Filler  
23 case, that her rationale for applying the first filed rule is  
24 applicable here as well. Indeed, KPMG was common to each of  
25 the I think three matters that were the subject of

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1 Judge Robinson's review in the Filler case, but I think her  
2 rational applies -- I think the first filed rule applies even  
3 if there are different parties, but even if it doesn't, the  
4 basic concept that the rules, quote, encourages sound judicial  
5 administration and promotes comity among Federal Courts --  
6 that's from the decision, and I omit the quotes -- is  
7 applicable here as well, and I quote further --

8 "The decision to transfer or stay the second action  
9 is within the discretion of the trial court.

10 However, invocation of the rule will usually be the  
11 norm, not the exception. Courts must be presented  
12 with exceptional circumstances before exercising  
13 their discretion to depart from the first filed  
14 rule."

15 And Judge Robinson noted that where you have the same  
16 set of facts, although not necessarily the same claims that  
17 there is compelling reason for invoking the rule, for granting  
18 a motion to transfer.

19 It seems to me that the other concerns expressed by  
20 the trustee do not overcome this conclusion. The fact that  
21 KPMG, U.S. and Belgium have settled all their claims in  
22 Massachusetts does not defeat this cause. The basic  
23 proposition is that there has been a substantial omission in  
24 the facts of this scenario by the judicial team in  
25 Massachusetts, and that needs to be capped to resolve this



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1 matter as expeditiously as possible.

2 So nor is it a concern that discovery has closed in  
3 Massachusetts and that no consolidation of discovery is  
4 possible. It is understood that the trustee will pursue, will  
5 not doubt have the chance to pursue discovery, but the  
6 discovery issues which are complex and out of the norm in this  
7 case, at least in some degree, I think will be better handled  
8 in terms of the familiarity with -- with the underpinnings and  
9 the opportunity to be in harmony with the other decisions.

10 The trustee will have every opportunity to assert its  
11 own positions. I have no, of course, as the trustee asserts in  
12 his papers, he and the plaintiff are entitled to impartial  
13 consideration, and I have no doubt that they will get it. The  
14 entire import of the first filed rule has no room for concern  
15 about prejudgments or ideas that impressions about a case are  
16 formed by the first judge who has those cases. We all I'm sure  
17 have enough faith in the system, and in particular, judges to  
18 understand that they have the capacity and then some to face  
19 each set of parties with the positions that they take and to  
20 resolve their disputes in an impartial way.

21 So for those reasons, I will enter an order granting  
22 the motion of KPMG, U.S. for transfer of venue to the District  
23 of Massachusetts. I'm not sure if a form of order has been  
24 submitted.

25 MR. FALLON: Your Honor, this is Brad Fallon. There

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1 was a form of order submitted with the motion which is at  
2 docket number four. We're happy to submit that order or --

3 THE COURT: Yes. That would be helpful. Thank you.  
4 I will note that I did find the stipulation and order that was  
5 signed by -- between these parties on November 5th about KPMG,  
6 Belgium's requirements to answer and respond and so forth, and  
7 that has been entered. So I would appreciate a hard copy of  
8 the order on this motion.

9 MR. FALLON: We'll do that, and we'll run it by the  
10 plaintiff.

11 THE COURT: Very good. Anything else on this call?

12 MR. TRENCH: I think not, Your Honor. I think this  
13 was the only matter. We're --

14 THE COURT: All right.

15 MR. TRACY: -- before --

16 A FEMALE SPEAKER: Your Honor --

17 MR. TRENCH: -- before next Thursday on other  
18 matters.

19 THE COURT: Indeed, and I thank you all and wish you  
20 a good holiday.

21 A FEMALE SPEAKER: You too, Your Honor. Thank you.

22 MR. TRENCH: Thank you, Your Honor.

23 A MALE SPEAKER: Thank you, Your Honor.

24 THE COURT: Bye bye.

25 MR. TRENCH: Bye bye.

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(Hearing Adjourned)

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C E R T I F I C A T I O N

I, Maureen Emmons, court approved transcriber,  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.

Maureen Emmons

Date: 10/15/04

MAUREEN EMMONS

DIANA DOMAN TRANSCRIBING